

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD KIRK and U.S. POSTAL SERVICE, WEST SACRAMENTO
MAIL PROCESSING CENTER, West Sacramento, CA

*Docket No. 98-207; Submitted on the Record;
Issued September 1, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has more than a one percent permanent impairment of the right arm.

On December 27, 1994 appellant, then a 24-year-old mail processor, was feeding a conveyor belt on a postal machine when the transport arm of the machine jammed. He pulled on the transport arm to release the tension. The transport arm released, jerking appellant's right arm. Appellant filed a claim for a strain of the right arm, shoulder and neck. The Office of Workers' Compensation Programs accepted appellant's claim for shoulder strain and thoracic subluxation. Appellant received continuation of pay for intermittent periods between December 28, 1994 through March 28, 1995, leave buy back for sick leave taken between March 30 and April 16, 1995, and temporary total disability for intermittent periods from April 1, 1995 through December 16, 1996. On September 23, 1995 appellant was offered a modified position as a mail processor which he accepted. In a December 5, 1995 decision, the Office found that the position of mail processor fairly and reasonably represented appellant's wage-earning capacity and therefore found that he had no loss of wage-earning capacity. Appellant requested a hearing before an Office hearing representative but subsequently withdrew his request to seek development of his claim for a schedule award. In a May 8, 1997 decision, the Office issued a schedule award for a one percent permanent impairment of the right arm. In a September 2, 1997 decision, an Office hearing representative, upon written review of the record, affirmed the Office's May 8, 1997 decision.

The Board finds that the case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.³

The Office referred appellant to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, for an examination and evaluation of the extent of permanent impairment of the right arm. In a February 21, 1997 report, Dr. Swartz stated that appellant had mild discomfort with full range of motion of the right shoulder. He indicated that appellant had a normal range of motion of both shoulders with no local tenderness over either shoulder. Dr. Swartz found only minimal discomfort with palpation on the right intrascapular region with no spasm and no overt or significant tenderness. He reported that there were no neurologic findings and no alteration of sensory or motor function. Dr. Swartz noted that appellant's grip strength was weaker on the right than the left but commented that appellant had poor effort with the right hand. He concluded that appellant had a resolved right intrascapular myofascial strain which was directly related to the employment injury. Dr. Swartz stated that appellant had no residual pathology, no underlying disease and no objective findings. He summarized that the subjective factors included minimal pain in the right parascapular region and complaints of inability to perform the required lifting activities of his job. Dr. Swartz commented that there were no objective factors of disability. He noted no known industrial or preexisting disabilities. Dr. Swartz stated that there was no loss of function due to pain, discomfort or sensory alteration and no functional loss due to limitation of motion. He indicated that appellant had no muscle weakness. Dr. Swartz reported appellant had a slight atrophy of the right arm but commented that it was not related to the employment injury. He concluded that appellant had no permanent impairment of the right shoulder.

In an April 17, 1997 memorandum, an Office medical adviser indicated that appellant had no permanent impairment due to loss of motion or loss of strength. She indicated that appellant had a Grade 1 level of pain which equaled a 25 percent level of impairment of the suprascapular nerve which was a 5 percent permanent impairment of the arm for total loss of sensory function. She multiplied the 25 percent impairment for pain by the 5 percent permanent impairment for the suprascapular nerve which equaled a 1 percent permanent impairment of the arm.

The Office asked appellant's treating physician, Dr. Thomas H. Burton, a Board-certified orthopedic surgeon, to review and comment on Dr. Swartz' report. In a May 7, 1997 report, Dr. Burton stated that, while he did not disagree with Dr. Swartz' measurements of appellant's

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

³ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

range of motion, he noted Dr. Swartz made no comment on the unusual position of the inferior pole of the scapula on motion of the shoulder which was a problem Dr. Burton had trouble explaining or understanding in the many times he had examined appellant. He also noted that appellant had a wrist fusion of the right wrist in February 1996. Dr. Burton commented that since appellant had no motion of the right wrist, it was possible that this condition might explained appellant's marked weakness in grip strength testing.

Dr. Burton cited two factors not considered by Dr. Swartz in his report. Dr. Burton noted that appellant had an abnormal position of the scapula and a fusion of the right wrist. Dr. Swartz did not address whether the findings in relation to appellant's scapula actually existed, were related to the employment injury or preexisted the employing establishment. Similarly, the record does not indicate whether the surgery appellant underwent on the right wrists was related to the employment injury or was for a preexisting condition. Dr. Swartz only stated that appellant had no preexisting conditions. The Board has held that, in calculating a schedule award, preexisting conditions are to be included in determining the degree of impairment of the affected member of the body.⁴ The case must therefore be remanded for further medical development of whether appellant has any conditions of the right arm which are causally related to the employment injury or preexisted the employment injury and which would increase the permanent impairment of the right arm. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated September 2 and May 8, 1997 are hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
September 1, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁴ *Raymond Gwynn*, 35 ECAB 247 (1983).